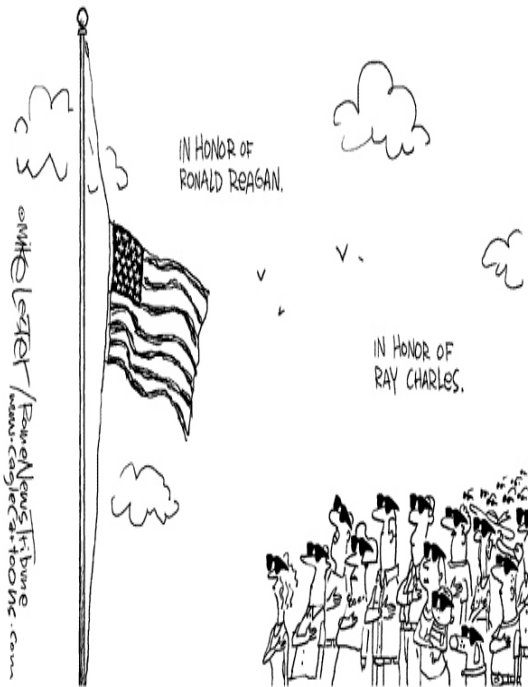




# THE PUBLIC LAWYER

## June 14, 2004

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### NEVADA CASES

<http://www.leg.state.nv.us/scd/OpinionListPage.cfm>

*City of Las Vegas v. Walsh* 120 Nev. Adv. Op. No. 44 (June 11, 2004). “This case involves the admissibility of an affidavit of a registered health professional pursuant to NRS 50.315(4). At the outset of the trial, the City of Las Vegas requested that the municipal court admit the affidavit of a registered nurse who withdrew Mike

Gehner’s blood. The municipal court ruled that certain facts contained in the affidavit were not admissible, and thus, the nurse would need to testify. The City then filed a petition for a writ of mandamus requesting the district court to compel the municipal court to admit the nurse’s affidavit in its entirety. The district court denied the petition. We agree that the affidavit in its entirety was not admissible, but we do so on different grounds from those relied upon by the district court. Accordingly, we affirm the district court’s denial of the City’s petition for a writ of mandamus.”

*Bell v. Leven*, 120 Nev. Adv. Op 43 (June 11, 2004). “In this appeal, we consider whether perpetual contracts are enforceable. We hold that when the express language of a contract provides that the contract has a perpetual duration, such language must be enforced. Accordingly, we reverse the district court’s ruling that the perpetual duration clause in this contract was not legally sufficient, and remand this case for retrial.”

*Miles v. State*, 120 Nev. Adv. Op 42 (June 10, 2004). “In this appeal, we consider whether a district court has jurisdiction to permit an inadequately verified post-conviction petition for a writ of habeas corpus to be cured by subsequent amendment. We conclude that such a defect is not jurisdictional and, therefore, the



district court has discretion to permit a petitioner to amend the petition to cure an inadequate verification.”

*Bonicamp v. Vazquez*, 120 Nev. Adv. Op.41 (June 10, 2004). “In this appeal, we consider whether the district court erroneously awarded judgment to respondents under NRS 40.430, Nevada’s one-action rule. We affirm.”

*Lindblom v. Prime Hospitality Corp.*, 120 Nev. Adv. Op 40 (June 10, 2004). “In this appeal, we consider whether a defendant’s participation in pre-suit negotiations may constitute an appearance and entitle the defendant to notice of default proceedings under NRCP 55(b)(2).”

*Browning v. State*, 120 Nev. Adv. Op. 39 (June 10, 2004). “In 1985, appellant Paul Lewis Browning robbed and stabbed to death Hugo Elsen at Elsen’s jewelry store in Las Vegas. Browning was convicted of murder and sentenced to death. This is his timely first petition seeking post-conviction relief, pursuant to former NRS 177.315-.385 (equivalent to a post-conviction habeas petition). The district court denied the petition, finding that Browning received effective assistance of counsel and that his other claims were procedurally barred. This appeal raises numerous claims. The primary issue is whether Browning’s appellate counsel was ineffective for failing to challenge the aggravating circumstance of depravity of mind. We conclude that counsel was ineffective in this regard, requiring us to vacate Browning’s death sentence and remand for a new penalty hearing. We otherwise affirm the district court’s order.”

*Martin v. Martin*, 120 Nev. Adv. Op. 38 (June 10, 2004). “This proper person appeal

arises from a custody dispute between appellant April Martin and respondent James Martin over the parties’ twelve-year-old child. The district court granted James’s motion to change primary physical custody based on changed circumstances. These changed circumstances included James’s remarriage and April’s alleged interference with James’s visitation with the child.

We conclude that remarriage alone does not establish changed circumstances. Consequently, the district court erred in finding changed circumstances on that basis. Additionally, although a custodial parent’s substantial or pervasive interference with a noncustodial parent’s visitation could give rise to changed circumstances warranting a change in custody, the record in this case does not support a determination that April substantially or pervasively interfered with James’s visitation. Accordingly, we reverse the district court’s order.”

*Kaczmarek v. State*, 120 Nev. Adv. Op. 37 (June 7, 2004). “Appellant Steven Kaczmarek was charged, tried before a jury, and found guilty of burglary, robbery, first-degree kidnapping, and first-degree murder, all committed with the assistance of a child. At the conclusion of the penalty phase, the jury returned a verdict of death for the murder.



Kaczmarek appeals, arguing first that police detectives violated his rights under the Fifth and Sixth Amendments of the United States Constitution by interviewing him regarding the instant crimes while he was incarcerated for unrelated charges and, second, that the district court erred during jury selection by denying his objections to the State's peremptory challenges of four non-Caucasian prospective jurors. We conclude that Kaczmarek is not entitled to relief on these claims. Related to his death sentence, Kaczmarek argues that the district court erred during the penalty phase by excluding the testimony of the victim's daughter regarding her opposition to the death penalty in this case. We disagree. Accordingly, we affirm Kaczmarek's judgment of conviction and sentence of death."

*Clem v. State*, 120 Nev. Adv. Op. 36 (June 10, 2004) (opinion on reh'rg). 'Appellants have petitioned for rehearing of *Clem v. State* (Clem II), our decision affirming the district court's denials of appellants' successive and untimely post-conviction petitions for writs of habeas corpus. They challenge Clem II's conclusion that their claims of retroactive entitlement to the 'deadly weapon' test of *Zgombic v. State* are barred by the law of the case and by the procedural bars of NRS Chapter 34. They assert, inter alia, that this conclusion is inconsistent with and overlooked our decision in *Leslie v. Warden* (Leslie II), wherein we reconsidered in habeas review our previous interpretation of the statutory death penalty aggravator 'at random and without apparent motive' and applied the corrected interpretation to Leslie's case, despite our earlier decision upholding the aggravator in Leslie's direct appeal.' We conclude that appellants' cases present factual and legal circumstances

distinguishable from those in *Leslie II* and therefore neither *Leslie II* nor its progeny is controlling authority here. Accordingly, we deny rehearing."

*Fire Ins. Exchange v. Cornell*, 120 Nev. Adv. Op. 35 (June 7, 2004). "In this appeal, we consider whether the enforceability and scope of exclusionary language in a homeowner's liability insurance policy for intentional acts and child molestation is ambiguous. We conclude that the policy, by its terms, unambiguously excludes coverage in connection with claims for negligent supervision of an adult child who commits statutory sexual seduction."

*Roberts v. State*, 120 Nev. Adv. Op. 34 (May 19, 2004). "In this appeal, we consider whether the State is required to provide a defendant charged with first-offense possession of a controlled substance with formal notice in the charging document that, pursuant to NRS 176A.100,[1] probation is discretionary rather than mandatory. We conclude that no formal notice is required because discretionary probation is not the equivalent of a sentencing enhancement under NRS 453.336 and, therefore, our holding in *Lewis v. State* is inapposite."

*Johnson v. State*, 120 Nev. Adv. Op. 33 (May 19, 2004). "Our holding in *Kuykendall* coincides with the reasoning in *Tauiliili*, and we conclude that credit for time served in presentence confinement may not be denied to a defendant by applying it to only one of multiple concurrent sentences. To hold otherwise would render such an award a nullity or little more than a 'paper' credit. Johnson was taken into custody at the same time for all of the charges to which he pleaded guilty, and therefore, he was entitled to have the 128 days credit for time served in presentence confinement applied to both



of the concurrent sentences imposed for counts I and II, and not only to the sentence imposed for count I.

In light of the above, we remand this matter to the district court with instructions to modify the sentence by applying the presentence confinement credit to both counts I and II.”

*J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. Adv. Op. 32 (May 19, 2004). “This appeal concerns a dispute over a contract for structural concrete work at the Sands Exposition Center. Although subcontractor J.A. Jones Construction Company obtained a judgment for \$1,152,912 against the construction management contractor, Lehrer McGovern Bovis, Inc. (LMB), Jones asserts that various district court errors resulted in an inadequate judgment.

We conclude that the district court erred in refusing to instruct the jury on exceptions to enforcement of “no damages for delay” clauses in construction contracts, and in dismissing Jones’s claim of cardinal change/abandonment/quantum meruit. Additionally, although Jones was improperly required to prematurely elect between suing either on the contract or in quantum meruit, Jones’s fraud-in-the-inducement claim was properly dismissed.”

*Gilman v. Nevada State Bd. of Med. Exam’rs*, 120 Nev. Adv. Op. 31 (May 19, 2004). License suspension of 60 days and \$18.093 in assessed costs and attorney fees upheld. Mere oversight of board budget does not equate with bias; assessed costs are not fines; clear and convincing evidence standard was appropriately applied.

*State v. Second Judicial Dist. Court*, 120

Nev. Adv. Op. 30 (May 13, 2004). “As discussed in *Cervantes*, the purpose of child pornography statutes is to prevent the distribution of child pornography and protect children; it is not to prevent defense counsel from adequately preparing for trial. The district court’s order compelling discovery of the videotape was not an abuse of discretion. Accordingly, we grant the petition for a writ of prohibition in part and direct the clerk to issue a writ instructing the district court to grant the Real Parties in Interest discovery of the videotape subject to the above restrictions on the videotape.”

*Mikohn Gaming Corp. v. McCrea*, 120 Nev. Adv. Op. 29 (May 12, 2004). “This is an appeal from a district court order that denied in part a motion to compel arbitration. Appellant seeks a stay of the district court proceedings pending consideration of this appeal. We granted a temporary stay on October 14, 2003.

Although our general stay factors, articulated in NRAP 8(c), apply in an appeal from an order refusing to compel arbitration, our stay analysis necessarily reflects arbitration’s unique policies and purposes and the interlocutory nature of the appeal. Consequently, the first stay factor—whether the object of the appeal will be defeated if the stay is denied—takes on added significance and generally warrants a stay of lower court proceedings pending resolution of the appeal. The other stay factors remain relevant, but absent a strong showing that the appeal lacks merit or that irreparable harm will result if a stay is granted, a stay should issue to avoid defeating the object of an appeal from an order refusing to compel arbitration.”

*Olson v. Richard*, 120 Nev. Adv. Op. 32 (May 12, 2004). “This appeal presents an issue of first impression related to



construction defects cases brought under Chapter 40 of the Nevada Revised Statutes. Based on our decision in *Calloway v. City of Reno*, wherein this court held that a plaintiff may not allege a negligence claim for purely economic losses in a construction defects case, the district court dismissed appellants' negligence claim. We conclude that the district court erred because, unlike at common law, a plaintiff can pursue a negligence claim when suing under NRS Chapter 40."

*Bronneke v. Rutherford*, 120 Nev. Adv. Op. 27 (May 12, 2004). "For the foregoing reasons, we decline to adopt the patient-oriented standard with regard to the chiropractic field and expressly adopt the professional standard for chiropractors. Accordingly, we affirm both the district court's final judgment and its order denying Bronneke's motion for a new trial."

*Pan v. Eighth Judicial Dist. Court*, 120 Nev. Adv. Op. 26 (May 5, 2004). "In a series of prior decisions, this court has stated that mandamus is the proper method for challenging the dismissal of a case on forum non conveniens grounds. Those decisions, however, did not address the interplay between writ relief and the availability and adequacy of an appeal. But in other decisions, this court has recognized that an appeal is generally an adequate legal remedy that precludes writ relief. Consequently, we take this opportunity to clarify that if all prerequisites for finality are met, an order that dismisses a case for forum non conveniens is a final judgment that should be reviewed on appeal, not through a writ petition."

*Morgan v. State*, 120 Nev. Adv. Op. 25 (May 5, 2004). "In this case, we consider whether the district court erred in denying a

pretrial suppression motion based on a claim of an unlawful arrest. The district court ruled that appellant Richard Leroy Morgan's arrest for a misdemeanor traffic offense was lawful because Morgan was driving with a suspended driver's license and had a previous history of failing to appear in court. We agree and, therefore, affirm the judgment of conviction."

*Pineda v. State*, 120 Nev. Adv. Op. 24 (May 4, 2004). "Appellant, Ray Pineda, was tried below before a jury and found guilty of second-degree murder with use of a deadly weapon. The district court thereafter sentenced Pineda to serve two consecutive terms of life imprisonment with the possibility of parole after ten years on each sentence.

Pineda contends on appeal that the district court erred in ordering in limine that the State could introduce evidence of his prior convictions for impeachment purposes should he decide to testify, rejecting Pineda's proposed jury instructions on the issue of self-defense, and in its refusal to admit expert testimony proffered by Pineda on the generalities of gang culture and gang life.

We reverse the judgment of conviction and remand for a new trial."

*Martinez v. State*, 120 Nev. Adv. Op. 24 (May 4, 2004). "This is a proper person appeal from a district court order that denied appellant Gina Martinez's motion for return of money deposited as bail. Martinez deposited \$6,000 cash bail for criminal defendant Patrick O'Kelly. In accordance with O'Kelly's guilty plea agreement, the district court's judgment of conviction applied \$5,038 of the cash bail toward the restitution owed by O'Kelly. We conclude that the district court lacked statutory authority to apply the cash bail deposited by

Martinez towards O'Kelly's restitution."



THE JENNIFER LOPEZ RECYCLING PROGRAM

### NINTH CIRCUIT CASES

(Cases without hyperlinks can be found at <http://www.ca9.uscourts.gov/ca9/newopinions.nsf>)

*United States v. Rutherford*, No. 03-10158 (9th Cir. June 10, 2004). "Martin P. and Nanja Rutherford, who were found guilty of two counts of tax evasion, appeal the district court's denial of their motion for a new trial on grounds of jury intimidation, tampering, and misconduct. They assert three errors on appeal. They first contend that the district court erred in concluding that jurors' statements that they discussed Mrs. Rutherford failure to testify at trial were inadmissible under Fed. R. Evid. 606(b). We reject this contention and affirm the district court on this point. They also assert that the jury was prejudiced because a large number of IRS and government agents sat directly behind the prosecution table throughout the trial and glared at the jurors, intimidating them, and causing some of the jurors to fear that if they acquitted the Rutherfords, the IRS might retaliate against

them. In this regard, the Rutherfords assert that the district court improperly restricted the scope of the evidentiary hearing and impeded their ability to make a prima facie showing that the jurors were adversely influenced by the government agents' conduct. The Rutherfords' more fundamental contention, however, is that the district court erred in finding that they must prove that the agents 'intended' to influence the jurors. According to the Rutherfords, they need show only that the agents' conduct created a risk that the verdict might be influenced, regardless of the government's motive. On the latter two points, we agree with the Rutherfords. Accordingly, we vacate the district court's ruling, and remand for further proceedings."

*Snyder v. The Navajo Nation*, No. 02-16632 (9th Cir. June 10, 2004). "Appellants in these consolidated appeals are law enforcement officers of the Navajo Nation Division of Public Safety who filed actions against both the Navajo Nation and the United States claiming violations of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219. The district court dismissed the claims against the Navajo Nation, holding that law enforcement was an intramural matter within the meaning of *Donovan v. Couer d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), and that the FLSA therefore did not apply to plaintiff law enforcement officers. The court also dismissed the claims against the United States. The tribal law enforcement officers appeal both dismissals. We affirm."

*Martinez v. Garcia*, No. 02-56678 (9th Cir. June 10, 2004). "We presume that a jury follows the instructions given by the trial court. *Ho v. Carey*, 332 F.3d 587, 594 (9th Cir. 2003). When the instructions, however, combine two theories of guilt, one of which



is untenable, and we cannot discern upon which theory the jury convicted, structural error has occurred. The state court's decision upholding Martinez's conviction was contrary to clearly established federal law. Accordingly, the district court's denial of Martinez's habeas petition is reversed."

*White v. Lambert*, No. 02-35550 (9th Cir. June 10, 2004). "Joel White challenges the State of Washington's authority to continue to confine him after his transfer in November 1999 from a Washington state prison to a privately-run prison in Colorado. Unlike most habeas petitioners, White is not challenging the validity of his state court conviction, but rather the administrative decision to transfer him from one prison to another. White alleges that the transfer, initiated by the Washington Department of Corrections, was in violation of both the United States and Washington constitutions. After exhausting his state court remedies, White filed a petition for a writ of habeas corpus in the federal district court for the Eastern District of Washington, invoking jurisdiction pursuant to 28 U.S.C. § 2241.

We further hold that, although 28 U.S.C. § 2254 was the proper statutory basis for White's petition, he did not need to obtain a COA to appeal the district court's judgment.

Finally, we hold that White's constitutional claims fail because he has no constitutional right to imprisonment in a specific prison, and the state court's determination was not 'contrary to' or 'an unreasonable application of, clearly established Federal law.' 28 U.S.C. § 2254(d)(1). Accordingly, we affirm the district court's dismissal of White's habeas petition."

*Ventura Mobil Home Communities Owners*

*Ass'n v. City of Buenaventura*, No. 02-56566 (9th Cir. June 10, 2004). "Plaintiff-Appellant, Ventura Mobile Home Communities Owners Association, contends the district court (1) miscalculated the date on which its claims brought under 42 U.S.C. § 1983 accrued and improperly applied the limitations period, (2) erroneously prevented it from asserting an 'as applied' takings challenge, (3) erroneously found the Association had not properly exhausted the remedies provided by state law so that its federal claims were not ripe, and (4) erred in not considering its argument that the city ordinance is preempted by state law. We affirm the district court's dismissal of Appellant's federal claims, but remand for entry of a judgment of dismissal without prejudice on Appellant's state law claims."

*United States v. Dhingra* No. 03-10001 (9th Cir. June 8, 2004). "Rakesh Dhingra appeals his conviction on one count of using the Internet to solicit sexual activity from a minor, in violation of 18 U.S.C. § 2422(b). On appeal, Dhingra raises a host of constitutional challenges. We conclude that § 2422(b) is not facially unconstitutional as overbroad and vague, nor does it violate the First and Tenth Amendments for incorporating state criminal sexual offense statutes. We are also unpersuaded by Dhingra's multiple evidentiary and sentencing challenges. Accordingly, we affirm Dhingra's conviction and sentence."

*United States v. Ford*, No. 03-10194 (9th Cir. June 8, 2004). "We must decide whether the United States is barred by double jeopardy or collateral estoppel from prosecuting an owner for 'managing and controlling' real estate for the purpose of distributing cocaine when he was previously acquitted of 'knowingly opening' the same place for such purpose.



Because the three elements of collateral estoppel are present here, the Government may not relitigate the prohibited purpose issue under § 856(a)(2) in a second prosecution of Ford. We therefore conclude that the district court erred in denying Ford's motion to dismiss Count 3."

*Olvera v. Giurbino*, No. 02-56134 (9th Cir. June 8, 2004). "We are called upon to review a district court's dismissal of a § 2254 habeas corpus petition containing both exhausted and unexhausted claims for relief. State prisoner Peter Gonzales Olvera filed in the United States District Court a mixed habeas corpus petition containing unexhausted claims. Olvera filed a motion stating that only eleven days remained before the statute of limitations would run and requesting that the district court permit him to withdraw his unexhausted claims, stay the petition, and allow him to return with the withdrawn claims after exhausting state remedies. The district court denied his motion and ultimately dismissed the petition because it contained unexhausted claims. We reverse."

*Anderson v. Morrow*, No. 02-35675 (9th Cir. June 7, 2004). "Kevin Anderson was convicted in 1993 of first-degree rape and sodomy under Oregon laws that prohibit having sexual intercourse with a person 'incapable of consent by reason of mental defect.' Or. Rev. Stat. §§ 163.375, 163.405. He appeals the denial of his petition for a writ of habeas corpus brought under 28 U.S.C. § 2254. He urges two points: (1) the trial court unconstitutionally excluded evidence of the victim's sexual history and reputation under Oregon's rape shield law; (2) the State of Oregon convicted him under an unconstitutionally vague statute. Neither point has merit, and we affirm."

*McCalla v. Royal Maccabees Life Ins. Co.*, No. 02-17051 (9th Cir. June 3, 2004). "The primary question in this case is whether revising a judgment to include mandatory prejudgment interest is a correction of a clerical error within the meaning of Federal Rule of Civil Procedure 60(a), which sets no time limit within which correction must occur. We hold that such a motion is not a correction of a clerical error, but is instead an alteration or amendment of the judgment under Federal Rule of Civil Procedure 59(e), which requires that the motion be filed no later than ten days after entry of the judgment."

*Ballaris v. Wacker Siltronic Corp.*, No. 02-35956 (9th Cir. June 3, 2004). "In conclusion, we affirm the district court's determination that the regular rate (and thus the overtime rate) of pay was properly calculated. We reverse, however, the determination that plaintiffs received all of the compensation due under the FLSA. The case is remanded for a determination of the amount of unpaid wages due to plaintiffs for time spent in gowning and related activities, putting on and taking off plant uniforms, traveling between cleanrooms and locker rooms, and participating in 'pass down' briefings. Wacker may not offset the paid lunch period against any or all such amounts or against any other compensation otherwise due. Because Wacker appears not to have accounted properly for the hours worked, we also reverse the court's summary judgment ruling as to plaintiffs' ERISA claims. The state law claims, having been dismissed on account of the erroneous judgment with respect to the federal claims, must also be reinstated."

*Castillo v. McFadden*, No. 03-15715 (9th Cir. June 1, 2004). "Petitioner Armando Castillo, an Arizona prisoner, appeals



the District Court's dismissal of his amended petition for habeas corpus. 28 U.S.C. § 2254. Castillo's amended petition alleges the Arizona trial court denied Castillo 'a fair trial in violation of the Fifth and Fourteenth Amendments' of the U.S. Constitution by permitting the jury to view what he contends was a highly prejudicial videotape of his interrogation. We conclude that Castillo failed to exhaust his state court remedies and affirm the District Court's dismissal of his petition."

*United States v. Fish*, No. 03-30362 (9<sup>th</sup> Cir. May 28, 2004). "Floyd Lovell Fish appeals his sentence of 51 months incarceration and three years of supervised release imposed following his guilty plea to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). In setting Fish's base offense level at 20, the district court concluded that Fish's prior conviction for violation of OR. REV. STAT. § 166.382, which prohibits the 'unlawful possession of a destructive device,' constituted a 'crime of violence' pursuant to United States Sentencing Guidelines §§ 2K2.1(a)(4)(A) and 4B1.2(a).

This provision was the subject of our recent decision in *United States v. Wenner*, 351 F.3d 969 (9<sup>th</sup> Cir. 2003), which was announced after Fish's sentencing. We are guided by *Wenner* to conclude that Fish's predicate crime of possession of a destructive device did not constitute a 'crime of violence' under Sentencing Guidelines §§ 2K2.1(a)(4)(A) and 4B1.2(a). The sentence is vacated and the case is remanded for resentencing."

*United States v. Camacho*, No. 02-50629 (9<sup>th</sup> Cir. May 27, 2004). "Alfonso Camacho, a United States citizen, appeals his conviction for importation of marijuana in violation of 21 U.S.C. §§ 952 and 960. He

argues that the district court should have suppressed the marijuana Customs inspectors found during a border search of the vehicle Camacho drove to the San Ysidro, California, point of entry. At issue is the use of a radioactive density measuring device called a 'Buster' — a relatively new technology the Customs Service has begun to use in border searches. Here, a Customs inspector used the Buster on the vehicle's spare tire while Camacho was still in the driver's seat. The Buster's reading led inspectors to search the spare tire, which contained marijuana.

The Supreme Court recently made clear that reasonable suspicion is usually not required for officers to conduct nondestructive border searches of property. *United States v. Flores-Montano*, 124 S. Ct. 1582, 1585-87 (2004). Because there is no record evidence that the Buster posed any danger to Camacho or the vehicle he was driving, we affirm."

*World Wide Video of Washington, Inc. v. City of Spokane*, No. 02-35936 (9<sup>th</sup> Cir. May 27, 2004). "This appeal raises two questions. First, whether the City of Spokane's ordinances regulating the location of adult-oriented retail businesses are constitutional. Second, whether an amortization period is required in this context and, if so, whether a reasonable amount of time was allotted for World Wide Video of Washington, Inc., to either relocate its stores or change the nature of its retail operations.

Because the record reveals no genuine issue of material fact regarding either of these issues, we affirm the district court's summary judgment for Spokane."

*This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.*



State of Oregon v. Ashcroft, 02-35587  
Opinion Filed: 5/26/04

Panel: Judge Richard Tallman (author);  
Senior Eighth Circuit Judge  
Donald Lay; Judge J. Clifford Wallace  
(dissenting)

The panel majority enjoined the enforcement of an interpretative rule issued by Attorney General John Ashcroft, known as the “Ashcroft Directive,” which declares that physician assisted suicide violates the Controlled Substances Act of 1970.

The Ashcroft Directive criminalizes conduct authorized by Oregon’s Death With Dignity Act, which was enacted by ballot measure and authorizes physicians to prescribe lethal doses of controlled substances to terminally ill Oregon residents.

Specifically, the Ashcroft Directive states that physician assisted suicide serves no “legitimate medical purpose” within the meaning of 21 C.F.R. § 1306.04, which prohibits physicians from dispensing controlled substances except for legitimate medical purposes, and that specific conduct authorized by Oregon’s Death With Dignity Act may render a physician’s registration inconsistent with the public interest and therefore subject to possible suspension or revocation.

A doctor, a pharmacist, several terminally ill patients, and the State of Oregon brought an action in federal district court, seeking declaratory and injunctive relief against the Ashcroft Directive. The district court entered a permanent injunction against enforcement of the Ashcroft Directive.

The panel held that although the district court lacked jurisdiction over this matter, this court had original jurisdiction pursuant to 21 U.S.C. § 877 over “final determinations, findings, and conclusions of the Attorney General” made under the Controlled Substances Act.

On the merits, the panel held that the Ashcroft Directive is unlawful and unenforceable for three reasons:

\* The Ashcroft Directive lacks clear congressional authority. The Attorney General may not exercise control over an area of law traditionally reserved for state authority, such as regulation of medical care, unless Congress’ authorization is “unmistakably clear.” Congress has provided no indication that it intended to authorize the Attorney General to regulate the practice of physician assisted suicide.

\* The Ashcroft Directive violates the plain language of the Controlled Substances Act. The Controlled Substances Act expressly limits federal authority under the Act to the field of drug abuse and prevention, and Congress so intended to limit federal authority. The Ashcroft Directive purports to regulate medical practices outside the field of drug abuse and prevention.

\* The Ashcroft Directive oversteps the bounds of the Attorney General’s statutory authority. Congress intended to limit the Controlled Substances Act to problems associated with drug abuse and addiction. To the limited extent that the Controlled Substances Act authorizes the federal government to make decisions regarding the practice of medicine, Congress empowered the Secretary of Health and Human Services, not the Attorney General, to make those decisions.

Accordingly, the panel ordered the injunction previously entered by the district court to be continued in full force and effect as the injunction of this court.

In dissent, Judge Wallace reasoned that because the Ashcroft Directive interprets an agency regulation, 21 C.F.R. § 1306.04, rather than the Controlled Substances Act itself, this court must accord the Ashcroft Directive “substantial



deference.” Nothing in the Controlled Substances Act’s text or legislative history authorizes the panel majority to deny deference to the Ashcroft Directive. Firmly established principles of the administrative law formulated by the United States Supreme Court and this court command this court to defer to the Attorney General’s interpretation of 21 C.F.R. § 1306.04.

*United States v. Lewis*, No. 03-10181 (9<sup>th</sup> Cir. May 25, 2004). “David Gene Lewis, a former California correctional officer, appeals the district court’s denial of his motion to dismiss the indictment. Lewis raises two issues. First, can Lewis seek interlocutory review of the district court’s denial of his ‘fair warning’ defense? Second, did the prosecution’s alleged *Brady* violations raise double jeopardy concerns? We answer both questions in the negative.”

*Mortenson v. County of Sacramento*, No. 03-15185 (May 24, 2004). “Sacramento County Sheriff’s Deputy Ronald Mortensen appeals the district court’s grant of summary judgment in favor of his employer. The question for decision is whether the Fair Labor Standards Act, 29 U.S.C. § 207(o), requires the county to allow its deputies to use accrued compensatory time off (‘CTO’) on days they specifically request unless it would ‘unduly disrupt’ the law enforcement agency’s function within the meaning of § 207(o)(5). Mortensen argues that we must defer to the Department of Labor regulations and opinion letter construing § 207(o)(5) and hold that deputies are entitled to use CTO on a specifically requested date. In contrast, the county maintains that its leave policy and the parties’ collective bargaining agreement comply with the FLSA because the county grants CTO use within a reasonable time—up to one year—after a deputy makes a

request. The county insists that under both the statute and its long-established leave practice, it may deny a CTO request for a specific date if all leave openings are full. We do not defer to the Department of Labor regulations because the statutory language is clear. Joining the Fifth Circuit, we hold that the text of § 207(o)(5) unambiguously states that once an employee requests the use of CTO, the employer has a reasonable period of time to grant the request. *See Houston Police Officers’ Union v. City of Houston*, 330 F.3d 298 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 300 (2003). The statutory language precludes an employee from forcing an employer to grant CTO in accordance with the employees’ wishes. *See id.* at 303. We further hold that the county’s implementation of its leave policy, which may result in denying a specific request when there are no available leave openings, and the parties’ Agreement regarding CTO use are consistent with § 207(o)(5). We affirm summary judgment for the county.”

*Awabdy v. City of Adelanto*, No. 02-57118 (9<sup>th</sup> Cir. May 20, 2004). “Two weeks before the 2000 election, Esau Awabdy suffered a significant setback in his campaign for another term on the City Council of Adelanto when the San Bernardino County District Attorney charged him with embezzling public funds. Awabdy pled not guilty prior to election day and, over one year later, the Superior Court granted a motion by a deputy District Attorney to dismiss the charge in the interests of justice. By then, however, Awabdy was no longer serving on the City Council, for he had been soundly defeated at the polls.

After the charge was dismissed, Awabdy filed this action under 42 U.S.C. § 1983. Awabdy alleges that the criminal proceedings were initiated on the basis of



false accusations and conspiratorial conduct by several Adelanto city officials who sought to deprive him of his First, Thirteenth, and Fourteenth Amendment rights. The district court granted the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

We reverse and remand for two reasons. First, the district court misinterpreted our cases regarding the constitutional tort of malicious prosecution under § 1983. Second, it overlooked Awabdy's direct claims under the First and Fourteenth Amendment, which, although they are closely related to the malicious prosecution claim in a number of respects, require independent consideration."

*United States v. Benitez-Perez*, No. 03-10419 (9<sup>th</sup> Cir. May 20, 2004). "David Benitez-Perez appeals the district court's enhancement of his offense level by 16 levels pursuant to U.S.S.G. § 2L1.2(b)(1)(A)(i) based on his prior conviction for violating Nevada Revised Statute § 453.337. We review the district court's decision that a prior conviction is a qualifying offense *de novo*, *United States v. Hernandez-Valdovinos*, 352 F.3d 1243, 1246 (9<sup>th</sup> Cir. 2003), and we affirm."

*McQuillion v. Schwarzenegger*, No. 01-16037 (9<sup>th</sup> Cir. May 19, 2004). "Carl McQuillion and his co-plaintiffs appeal the dismissal of their civil rights complaint against the Board of Prison Terms and the Governor of California, *inter alia*, for allegedly administering California's parole statutes to achieve an unwritten, unconstitutional policy of denying parole to inmates convicted of certain offenses. We affirm."

*Thinket Ink Information Resources, Inc. V. Sun Microsystems, Inc.*, No. 02-16754 (9<sup>th</sup>

Cir. May 17, 2004). "In this appeal, we consider the question, *inter alia*, of whether a corporation has standing to commence an action under 42 U.S.C. § 1981. We hold that if a corporation either suffers discrimination harm cognizable under § 1981, or has acquired an imputed racial identity, it is sufficiently within the statutory zone of interest to have prudential standing to bring an action under § 1981. We affirm the judgment of the district court in part, vacate in part, and remand."

*Austin v. Williams*, No. 02-16546 (9<sup>th</sup> Cir. May 17, 2004). "Samuel Eric Austin, a California state prisoner, appeals *pro se* the district court's summary judgment dismissing his claims under 42 U.S.C. § 1983 and state law. His claims arise from an incident in which a correctional officer allegedly exposed his genitalia to Austin and then filed a false disciplinary report against Austin when Austin complained to prison officials. We reverse and remand for further proceedings with respect to Austin's retaliation claim. We affirm the judgment of the district court in all other respects."

*United States v. Brooks*, No. 02-50539 (9<sup>th</sup> Cir. May 13, 2004). "Defendant-Appellant Guy Christopher Brooks, convicted in the district court on three counts of bank robbery, challenges the admission of incriminating evidence that police seized in a search of his hotel room made without a warrant. We consider whether the district court committed reversible error by denying Appellant's pretrial motion to suppress the evidence where that search was prompted by a '911' emergency phone call to the police from a hotel guest, staying in an adjacent room, who thought that she had heard the sounds of a woman being beaten. We have jurisdiction under 28 U.S.C. § 1291, and we affirm."



*United States v. Lynch*, No. 02-30216 (9<sup>th</sup> Cir. May 13, 2004). “Defendant John Lanny Lynch, appeals his conviction and twenty-year sentence for violation of the Hobbs Act, 18 U.S.C. § 1951, and his conviction and five-year consecutive sentence for using or carrying a firearm during the commission of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A), both arising out of the robbery and murder of Brian Carreiro in Montana.

The evidence clearly established a direct effect on interstate commerce. As previously determined by this court, 18 U.S.C. § 924(c)(1)(A) is not unconstitutional as being beyond the scope of Congress’ power under the Commerce Clause. There was probable cause for and an adequate showing of necessity for the issuance of the Clark County, Nevada wiretaps. A new trial utilizing the indirect analysis as to the effect on interstate commerce is not required since ample evidence of a direct effect existed. The evidentiary rulings of the district court precluding propensity evidence of the character of Pizzichiello were not erroneous. The aiding and abetting instruction on the use or carrying of a firearm was not in error and sufficient evidence supported the defendant’s conviction on Count II.”

*United States v. Martinez-Martinez*, No. 03-50230 (9<sup>th</sup> Cir. May 13, 2004). “Appellant Roberto Martinez-Martinez appeals his conviction and 51-month sentence for attempted illegal reentry into the United States in violation of 8 U.S.C. § 1326. At trial, Martinez argued that he did not possess the specific intent required to convict under § 1326 for attempting to enter, because the combined effect of heroin, methamphetamine, and Rohypnol (commonly known as rufies, or the ‘date rape drug’) rendered him ‘blacked out,’ and therefore not in control of his

conscious mind. On appeal, Martinez raises several arguments, though he primarily focuses his attention on claims that the district court seated a biased juror, and impermissibly allowed the government to delay indicting him after his arrest by improperly tolling the Speedy Trial Act.

As we find none of Martinez’s arguments availing, we now affirm the proceedings before the district court below in their entirety.”

*Bartlett v. Alameida*, No. 03-55936 (9<sup>th</sup> Cir. May 10, 2004). “William Louis Bartlett is a state prisoner serving a 25-year to-life sentence for failing to re-register as a sex offender pursuant to California’s sex offender registration statute, Cal. Pen. Code § 290(a)(1)(A). He contends, in his quest for a writ of habeas corpus, that his conviction violates due process because the state was not required to prove that he had knowledge of the lifelong duty to register. The district court denied Bartlett’s petition. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we reverse and remand.”

*Taylor v. Maddox*, No. 02-55560 (9<sup>th</sup> Cir. May 10, 2004). Petitioner is serving a life sentence without the possibility of parole for a crime committed when he was sixteen years old. The conviction hinges on a full confession petitioner gave after he was arrested in his home late one night and interrogated by two police detectives past 3:00 a.m. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, we consider whether the state courts were objectively unreasonable in finding that the confession was lawfully and voluntarily obtained.

Based on our independent review of the record, we conclude the district court erred. Taylor is entitled to habeas relief. We



therefore REVERSE the decision of the district court and REMAND with instructions to GRANT a conditional writ of habeas corpus, ordering Taylor's release unless the state of California notifies the district court within thirty days of the issuance of this court's mandate that it intends to re-try Taylor based on evidence other than the illegally-obtained confession, and actually commences Taylor's re-trial within seventy days of issuance of the mandate."

*Allen v. Woodford*, No. 01-99011 (May 6, 2004). "We must decide whether, if counsel had adequately investigated, presented and explained the available mitigating evidence, there is a reasonable probability that the result of Allen's penalty phase would have been a sentence other than death. Having carefully and independently weighed the mitigating evidence, 'both that which was introduced and that which was omitted or understated,' *Mayfield v. Woodford*, 270 F.3d 915, 928 (9th Cir. 2001) (en banc), against the extraordinarily damaging aggravating evidence, we are compelled to conclude, as did the district court before us, that it is not reasonably probable that even one juror would have held out for a life sentence over death. Given that Allen had just been convicted by his death-qualified jury of orchestrating — from jail — a conspiracy to murder seven people, and succeeding in the actual killing of three, all to retaliate for their prior testimony against him and to prevent future damaging testimony, and that the potential evidence in mitigation was neither explanatory nor exculpatory and was provided by persons unaware of Allen's numerous horrendous crimes or who were otherwise impeachable, we must conclude that there is no reasonable probability, i.e., 'a probability sufficient to undermine confidence in the outcome,'

*Strickland v. Washington*, 466 U.S. 668, 694 (1984), that the jury would have reached a different result. We therefore affirm."

*United States v. Navarro-Vargas*, No. 02-50663 (9<sup>th</sup> Cir. May 4, 2004). "Steve Navarro-Vargas appeals his conviction, contending that the district court should have dismissed his indictment because: (1) the charge given by the district court to the grand jury denied his Fifth Amendment right to the unfettered judgment of the grand jurors by instructing them not to consider the wisdom of criminal laws and that they should not be concerned about the possible punishment in the event of conviction; (2) the charge violated his Fifth Amendment right to the grand jury's independent exercise of its discretion by instructing the grand jury that it should indict if it found probable cause; and (3) 21 U.S.C. §§ 841 and 960 are unconstitutional. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm."

#### Today's Word:

**Tenebrific** *(Adjective)*

**Pronunciation:** [te-nê-'bri-fik]

**Definition 1:** Causing darkness, darkening, obscuring, obfuscating.

**Usage 1:** Although "tenebrific" is usually used as a synonym of "tenebrous," there is a subtle difference: tenebrous ['te-nê-brês] means "dark, shadowy; obscure, unclear; gloomy or pessimistic" while today's word means "causing" any of those conditions. "Tenebrious" is a widely accepted misspelling of tenebrous that has crept into the language. Both adjectives have nouns, "tenebrificity" and "tenebrosity" or you can always just add -ness: "tenebrousness," "tenebrificness."